(17)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 763

THE KELLING NUT CO. (a corporation),
Petitioner,

vs.

NATIONAL NUT COMPANY OF CALIFORNIA
(a corporation),
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Respondent, National Nut Company of California, opposes the petition of The Kelling Nut Co., defendant below, for a writ of certiorari in the above entitled cause for each and all of the following reasons:

1. The petition is primarily designed for the purpose of obstruction and delay, and is without merit.

2. The petition is unsupported by the facts or by the pertinent law.

3. The rulings of the District Court and the Circuit Court of Appeals, which petitioner seeks to review, are sound; and cannot be materially altered without wide and unjustified departure from the prevailing rules and well established principles of practice in those Courts, and without substantial and unjustified prejudice to respondent.

4. No issue is involved meriting review by this Court.

BRIEF STATEMENT OF FACTS AND ISSUES.

On April 23, 1943, as an alternative to a motion for leave to consolidate the present action, then pending in the U. S. District Court for the Southern District of California, Central Division, and an action pending in the U. S. District Court for the Northern District of Illinois, Eastern Division, respondent-plaintiff moved for dismissal of the present action *without prejudice and with costs to abide the outcome* of the said Illinois action (R. 51). The said Illinois action includes in substance the issues involved in the present action and those involved in an earlier filed action pending in said Illinois Court; and names as defendants three corporate defendants and their respective officers, all charged to have joined in a course of action involving the acts complained of in respondent's complaint (compare complaint—R. 2—and bill of particulars—R. 9—in present action and plaintiff's complaint in the Illinois action—R. 56; and see R. 53, last paragraph, and R. 54, last paragraph).

The motion was granted upon the terms and conditions indicated by the decree of the District Court entered June 3, 1943 (R. 33), as modified by the decree entered June 22, 1943 (R. 36).

On September 9, 1943, petitioner, The Kelling Nut Co., moved for an order modifying the decree of the District Court entered June 22, 1943, and for taxation of costs and expenses under the decree as so modified (R. 38). On February 7, 1944, the District Court refused to vacate or modify its decree entered June 22, 1943 (R. 41); and denied petitioner's motion for taxation of costs and expenses submitted with and dependent upon its motion to modify said decree. The motion was denied without prejudice, and the order of the Court expressly states when a motion for costs under the decree of June 22, 1943, will be entertained.

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, from that portion only of the February 7th order of the District Court which denied petitioner's motion for a determination and taxation of its costs and expenses (R. 43 and 46). The refusal of the Court to vacate or modify the decree of June 22, 1943, was not appealed.

Respondent's motion to dismiss the appeal (see record of proceedings before the C.C.A. following page R. 76) was granted by the Circuit Court of Appeals summarily, without written opinion, on August 28, 1944 (R. 83). Petitioner's petition for rehearing was denied (R. 87) and thereafter a petition for leave to file a second petition for rehearing was also denied (R. 95).

The principal issue at this time is:

(a) Whether or not an appeal lies from the order of the U. S. District Court entered February 7, 1944, denying without prejudice petitioner's motion for determination and taxation of costs and expenses otherwise than in accordance with the condition provided by the decree of June 22, 1944 (and at the same time specifying *when* a motion to so determine and tax costs and expenses will be entertained pursuant to the said decree).

Incident to said principal issue are numerous related issues including:

(b) The time for appeal from the decree entered June 22, 1943, having expired, can petitioner now raise the question of whether or not the condition included in the decree of June 22, 1943, was a proper exercise of discretion by the trial Court under Rule 41 (a) (2) of the Rules of Civil Procedure for the District Courts of the United States, by an appeal from an order denying a motion to tax costs otherwise than in accordance with the condition provided in that decree?

(c) Are issues involving merely the exercise of discretion by a trial Court as to *when* it will determine and tax costs in an action dismissed under Rule 41 (a) (2) of the Rules of Civil Procedure, and/or the appealability of an order which on its face is *not final*, of such public importance as to warrant consideration by this Court?

(d) Shall petitioner be permitted to allow the time for appeal to expire as to a decree of dismissal based upon express terms and conditions, and thereafter evade the terms and conditions to the prejudice of respondent by a collateral proceeding based upon an appeal from an order made in conformity with those terms and conditions?

Other pertinent questions will be noted and discussed in the ensuing argument.

ARGUMENT.

I.

PETITIONER'S PETITION IS DESIGNED PRIMARILY FOR PURPOSE OF OBSTRUCTION AND DELAY.

The record shows that a substantial part of the costs and expenses incurred by the parties were in connection with depositions taken during the period August 4, 1941, to August 23, 1943; and that "*some*" of said costs and expenses resulted from controversies arising in connection with the depositions (R. 54). The record does not expressly show how great a proportion of the total expense (over $39,000.00 alleged by petitioner) was the direct result of the dilatory and obstructionist tactics pursued by petitioner, nor is that proportion presently ascertainable from data available to respondent or the Court. The record does show (R. 53) that, while the present action (No. 1676 O'C) was pending in the California Court, pro-

ceedings in aid of the California action were conducted before the Illinois Court in connection with the depositions; and that during the period April 4, 1942, to May 7, 1943, a total of *81* entries were made in the Docket of those proceedings in the U. S. District Court for the Northern District of Illinois, Eastern Division (Foreign No. 234). By order of said Illinois Court dated January 28, 1943, deposition proceedings in the action were ordered to be conducted before a Master in Chancery, appointed by that Court. Many documents and records relevant to the case are still retained in the custody of that Master in Chancery (R. 53). The number of appearances before the Court and entries in the Docket of the case (Foreign 234) speaks plainly of the extent of the controversies for which "*some*" of the expense was incurred. A frivolous appeal by petitioner from one of the orders of the Illinois Court in those proceedings was dismissed by the Circuit Court of Appeals for the Seventh Circuit, whose opinion is reported at 134 F. (2d) 532.

Respondent's complaint in Action 43-C-423, filed for the purpose of consolidating in a single action, at the domicile of the corporate defendants, its claims against petitioner and related corporate defendants and their respective officers, was filed April 21, 1943. Proceedings instituted in behalf of petitioner, The Kelling Nut Company, have so delayed the progress of that suit that answer has not yet been filed therein by any of the defendants.

The present petition for a writ of certiorari, based on an appeal summarily dismissed by the Circuit

Court of Appeals for the Ninth Circuit, is charged to be merely another example of the dilatory and obstructionist actions which have characterized petitioner's studied efforts (extending over three years) to prevent trial of plaintiff's action upon the merits.

II.

THE PRESENT PETITION IS WITHOUT MERIT IN FACT AND IN LAW.

The order of U. S. District Judge J. F. T. O'Connor, from which the present petition has sprung, involves merely a proper exercise of the discretion extended to the U. S. District Courts by Rule 41 (a) (2). The Court was of course aware of the bitter contests which have been proceeding before both the California and the Illinois Courts for many months. The books, records, and personnel of petitioner (and related corporations named as defendants in No. 43-C-423 in the Illinois Court) were (and still are) located at Chicago within the jurisdiction of the Illinois Court. Respondent became convinced and advised the Court that the cause could be tried in Illinois more expeditiously than in California. The decree of the California Court, dismissing the California action without prejudice, and upon the condition stated in the Modified Decree of Dismissal (R. 36) was made in contemplation of those facts, and was obviously a proper exercise of the Court's discretion under Rule 41 (a) (2). That rule provides for dismissal

> "* * * upon order of the Court and upon such terms and conditions as the Court deems proper."

The terms and conditions are purely discretionary.

> "Rule 41 (a) (2) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, govern this matter. The Rule provides that an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. From a reading of this Rule and of numerous decisions of the Federal Courts it is clear that the intent of the Rule is to leave the matter of dismissal to the sound discretion of the trial court. It is incumbent on the court to consider the rights of the parties and how they will be affected and what benefits or injuries may result to the respective sides in the controversy if the dismissal is granted."
>
> *Colonial Oil Co. v. American Oil Co.*, 3 F.R.D. 29 at 30-31.

If, as petitioner seems to urge, the Court is to be allowed no alternative but to immediately determine and tax all costs and expenses upon dismissal of a suit, then the Court is deprived of the discretion expressly extended to the Court by Rule 41 (a) (2).

No decision based upon facts reasonably similar to the facts of the present case has been cited by petitioner, or found by respondent. For example, the decision in *Home Owner's Loan Corp. v. Huffman*, 134 F. (2d) 314, cited and relied upon by petitioner, involves a case where *after trial* and decision in the

lower Court, and after *reversal* by the decision of the appellate Court *on appeal,* the plaintiff was allowed to dismiss without prejudice and without taxation of costs. Can the ruling of the C.C.A. on such facts be regarded as limiting the sound exercise of discretion by the trial Court upon the facts of the present case?

Neither the facts, the Rules of Civil Procedure, nor the weight of authority supports petitioner's position.

III.

PETITIONER'S REMEDY WAS BY APPEAL FROM THE MODIFIED DECREE OF DISMISSAL ENTERED JUNE 22, 1943, AND HAVING FAILED TO APPEAL PETITIONER CANNOT NOW EVADE OR ALTER THE TERMS AND CONDITIONS OF DISMISSAL TO THE PREJUDICE OF RESPONDENT.

If petitioner was dissatisfied with the terms and conditions upon which the District Court dismissed respondent's action, its remedy was by appeal from the decree of the Court. Petitioner did not appeal. Instead, it asked modification of the decree to permit determination and taxation of costs otherwise than in accordance with the terms and conditions stated by the Court (Motion, R. 38).

Respondent's motion was for dismissal without prejudice and *with costs to abide the outcome of the Illinois action* (R. 51). The decree of the Court entered in granting that motion plainly stated that the costs and expenses were to be determined in the future, obviously after the trial of the Illinois action, upon motion presented to the Illinois Court or to the Cali-

fornia Court. If, on direct appeal from that decree, the terms and conditions had been held improper, respondent would have been under no obligation to accept a dismissal upon terms or conditions not in accord with respondent's motion to dismiss.

> "Where the order is for leave to discontinue upon terms, plaintiff may refuse to accept the terms of the order and continue the action."
>
> 27 *Corpus Juris Sec.*, Dismissal & Nonsuit, Sec. 37, p. 195, citing *Sim v. Pindell*, 252 N.Y.S. 399.

> "If the plaintiff complies with these conditions, each case may then be dismissed without prejudice, otherwise each case will either remain in this court for trial, or be dismissed with prejudice."
>
> *Taylor v. Swift & Co.*, 2 F.R.D. 424.

In such an event, the dismissal could have been set aside, and the California action carried on to trial. Instead, petitioner has sought to trap respondent between a decree of dismissal which has become final as to respondent, while seeking to evade the terms and conditions imposed by the Court and to recoup from plaintiff all the costs and expenses which petitioner extravagantly expended in a desperate effort to prevent trial of the action. The effect of the order of February 7, 1944, here involved is merely to recognize the finality of the decree of June 22, 1943, in the form in which it was entered; and to more definitely state *when* the matter of costs and expenses will be entertained by the Court.

On its face, the interlocutory order of February 7, 1944, is *not* a *final* order, since it expressly states that further action may be taken, and how and when further order may be had. Such an order is not appealable.

> "The Circuit Courts of Appeals are given no right to review other than final judgments, except injunction orders, and no judgment is final which does not terminate the litigation between the parties on the merits of the case, or on some severable phase thereof, nor until it is entered in a court from which execution can issue." (Authorities cited.)
>
> *Crooker v. Knudsen,* 232 Fed. 857 at 858.

> "A final decree or judgment is one which puts an end to the controversy between the parties litigant. If the decision or judgment leaves some matter involved in the controversy open for future hearing and determination before the ultimate rights of the parties are conclusively adjudicated, it is interlocutory, and not final."
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> *Beighle v. LeRoy,* 94 F. (2d) 30, at 31.

The Court's order on petitioner's motion to vacate and modify portions of the modified decree of dismissal entered June 22, 1943, on which petitioner's motion to determine and tax costs was conditioned, was not in itself appealable; and petitioner's motion did not extend its time for appeal from the modified decree of dismissal.

> "On the attempted appeal from the order of the court below denying plaintiff's motion to vacate the order of dismissal, it is to be observed

that, save in certain instances or exceptions not now material, this court has the jurisdiction to review only final decisions. 28 U.S.C.A. Sec. 225. An order of dismissal is a final judgment from which an appeal will lie. Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., supra; Wilson v. Republic Iron & Steel Co. et al., 257 U.S. 92, 96, 42 S. Ct. 35, 66 L. Ed. 144. But an order denying a motion to vacate an order of dismissal is not such a final order, for it is 'The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree, or order. (Cases cited.)' Republic Supply Co. of Calif. v. Richfield Oil Co. of Calif., 9 Cir., 74 F. 2d 909, 910. See also Bensen v. United States, 9 Cir., 93 F. 2d 749. In the circumstances, therefore, we have no alternative but to dismiss the appeal in No. 9510." (Emphasis ours.)

Hicks v. Bekins Moving and Storage Co., 115 F. (2d) 406, at 409.

"The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal."

Roemer v. Neumann, 132 U. S. 103, 10 S. Ct. 12.

"Safeway's notice of appeal states that it 'hereby appeals * * * from the judgment of this Court entered the 17th day of January, 1942 * * *' But the order of that date was one denying a motion for (1) rehearing, and it is settled that no appeal lies from such an order. Restifo v. Hartig, 61 App. D. C. 252, 61 F. 2d 404; International Bank

v. Securities Corp., 59 App. D. C. 72, 32 F. 2d 968."

Safeway Stores Inc. v. Coe, 58 U.S.P.Q. 11.

Petitioner is brazenly attempting now to evade or secure indirect modification of the terms and conditions provided in the modified decree of dismissal entered June 22, 1943, by appeal from an order which is obviously only collateral to the issues determined by said decree. Such in effect is the ruling of the Circuit Court of Appeals which petitioner now seeks to bring up for review by this Court.

IV.

NO ISSUE MERITING THE TIME AND ATTENTION OF THIS COURT IS INVOLVED.

Is the exercise of sound discretion by a trial Court as to when a motion to determine and tax costs in an action dismissed without prejudice a matter of such public interest and importance as to require review by this Court?

Are the statutory provisions and established principles of appeal practice subject to review and revision by this Court upon writ of certiorari merely because petitioner neglected to raise the points here involved by direct appeal from the decision of the District Court?

Respondent respectfully submits that no issue has been raised which merits the time and attention of this

Court. To hold otherwise will open the door to a petition for a writ of certiorari to this Court on every discretionary interlocutory order made by a District Court and either dismissed by the Circuit Court of Appeals (as in this case) or ruled upon adversely to the wishes of the petitioner.

CONCLUSION.

Respondent has purposely confined the foregoing discussion to a brief statement of facts and circumstances believed to be material; and has refrained from any detailed discussion of the numerous misstatements, fallacies and excursions outside the record which mark petitioner's petition. On the facts and the law, as above summarized, respondent submits that, for each and all of the reasons above noted, the present petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 10, 1945.

Respectfully submitted,
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Attorneys for Respondent.